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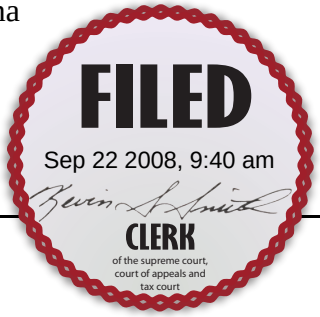

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE SUPERVISED ESTATE OF FRED L. RUSSELL, DECEASED, THE FRED L. RUSSELL REVOCABLE TRUST, ROBIN BUTLER, EXECUTRIX AND TRUSTEE,	)	
Appellant-Executrix,	)	
vs.	)	No. 12A02-0801-CV-121
HAROLD KINSLER,	)	
Appellee-Intervenor.	)	

APPEAL FROM THE CLINTON SUPERIOR COURT
The Honorable Kathy R. Smith, Judge
Cause No. 12D01-0612-ES-6

September 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Executrix, Robin Butler, as Executrix and Trustee of the Estate and Trust of Fred L. Russell (Trustee), appeals the trial court's Order directing distribution of the Revocable Trust and allocation of the administrative expenses.

We affirm.

ISSUE

Trustee raises one issue on appeal, which we restate as follows: Whether the trial court correctly interpreted the provisions of the Fred L. Russell Revocable Trust by ordering that the beneficiary of the specific devise of real estate is not required to contribute to the payment of the administrative expenses incurred by the Trust.

FACTS AND PROCEDURAL HISTORY

On November 19, 1990, Fred L. Russell (Russell), a resident of Florida, executed a Revocable Trust (Trust). He changed the language of the Trust instrument on September 14, 1992, by executing an "Amended Revocable Trust" which "restate[d] the trust agreement in its entirety." (Appellant's App. p. 23). He further amended this instrument on April 30, 2001, and again on December 31, 2002. On October 20, 2003, Russell executed his third amendment, changing the law applicable to the Trust from Florida to Indiana, after becoming a resident of Clinton County, Indiana, and appointing Robin Butler as Trustee. On July 26, 2004, he executed his fourth amendment and approximately three weeks later, on August 13, 2004, Russell added a subparagraph with respect to inheritance, estate, and succession taxes by way of a fifth amendment.

On December 8, 2006, Russell died testate, leaving a will which poured over all of the assets of his estate into the Trust. The fourth amendment to the Trust instrument provided for the distribution of assets as follows:

> Paragraph E, of Article XIII, of said Amended Revocable Trust agreement, as heretofore amended, is hereby further amended to read as follows, to-wit:
>
> E. Upon the Grantor's death, all remaining principal and any undistributed income of this Trust shall be distributed as follows:
>
> 1. Grantor's Successor Trustee shall pay all expenses incidental to setting this Trust and shall make the following distributions, free of this Trust, to-wit:
>
> a. All of Grantor's personal effects, watches, rings, jewelry and all tangible personal property not otherwise specifically given to a beneficiary by Grantor pursuant to his Last Will and Testament, shall be distributed to said Robin Butler, individually, if living. If said Robin Butler shall not survive the termination of this Trust, then said assets named in this Paragraph 1 a. shall be distributed to Harold Kinsler, . . .
>
> b. All real property in Indiana, presently comprising one hundred fifty-six (156) acres, more or less, shall be distributed to said Harold Kinsler, and if he fails to survive the termination of this Trust, then distribution shall be to his issue, per stirpes, who do survive it.
>
> 2. All stocks, bonds and other investments shall be sold and liquidated, and then all remaining assets, principal and accumulated income, of this Trust shall be distributed, free of this Trust, as follows:
>
> a. Forty percent (40%) thereof to Blaine Butler and Robin Butler, individually, share and share alike, or to the survivor of the two of them if one of them fails to survive such termination.
>
> b. Twenty percent (20%) thereof to Everett Kesterton and Ester Kesterton, . . ., share and share alike, or to the survivor of the two of them if one of them fails to survive such termination.

> c. Ten percent (10%) thereof to James Kesterton and Elaine Kesterton, . . . , share and share alike, or to the survivor of the two of them if one of them fails to survive such termination.
>
> d. Fifteen percent (15%) thereof to Richard E. Grove and Helen E. Grove, . . . , share and share alike, or to the survivor of the two of them if one of them fails to survive such termination.
>
> e. Fifteen percent (15%) thereof to Humane Society of Clinton County, . . .
>
> f. In the event that no beneficiary named in a particular subparagraph of this Paragraph E.2 is in existence at the termination of this Trust, then the distribution pursuant to the other subparagraphs under this Paragraph E.2 shall be increased proportionately.

(Appellant's App. pp. 54-56). The fifth amendment to the Trust retained the distribution of bequests as stipulated in the fourth amendment, but added, as a new subparagraph:

> 3. All inheritance, estate and succession taxes, including interest and penalties thereon, by reason of Grantor's death, with respect to the assets distributed pursuant to this Paragraph E, to any beneficiary shall be charged to and paid by such beneficiary. Successor Trustee shall withhold such amounts or make a demand on each such beneficiary for payment of his or her proportionate share of such inheritance, estate and succession taxes due as a result of assets being distributed to such person.

(Appellant's App. p. 58).

On December 12, 2006, the trial court granted the Trustee's Petition to Probate the Will and Issuance of Letters Testamentary. On August 28, 2007, Appellee-Intervenor, Harold Kinsler (Kinsler), petitioned the trial court to docket the Trust and to order distribution of the real estate. His petition also requested the trial court to construe the Trust's provisions concerning the allocation of the Trust's administrative expenses. Following a hearing, on November 30, 2007, the trial court entered its Order Directing Distribution of Real Estate and Construing Trust, ordering, in pertinent part, that the

> [T]rustee of the [T]rust is ordered to promptly distribute the real estate comprising approximately 156 acres located in Clinton County, Indiana to beneficiary [Kinsler].
>
> IT IS FURTHER ORDERED AND DECREED that the administrative expenses of the [T]rust are "expenses incidental to settling" the [Trust] as described at Paragraph XIII.E.1 of the [T]rust, and that the [T]rust provides that these expenses are to be paid by the [T]rustee; the [T]rust agreement does not authorize the [T]rustee to make a demand of or to charge [Kinsler] with any portion of the administrative expenses, and as specific devisee of the real estate, [Kinsler] is not required to contribute to the administrative expenses of the [T]rust.

(Appellant's App. pp. 1-2).

The Trustee now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, the Trustee contends that the trial court erred in its interpretation of the provisions of the Trust by ordering that the beneficiary of the specific devise of real estate is not required to contribute to the payment of the administrative expenses incurred by the Trust. The interpretation of a trust is a question of law for the court to which we apply a *de novo* standard of review. *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust No. 1 U/A January 18, 2002, Trustee, Nat'l City Bank of Ind., Tr.*, 855 N.E.2d 592, 597 (Ind. Ct. App. 2007), *trans. denied*. The primary purpose of the court in construing a trust instrument is to ascertain and give effect to the settlor's intention unless it is in violation of some positive rule of law or against public policy. *Hauck v. Second Nat'l Bank of Richmond*, 286 N.E.2d 852, 861 (Ind. Ct. App. 1972), *reh'g denied*. The plain and unambiguous purpose and intention of the settlor must be determined only from the terms of the instrument itself without taking individual clauses out of context and considering same without reference

to the whole instrument. *Id*. Whenever possible, trust instruments will be construed in a manner which renders the trust operative and effective. *Id*.

The so-called "four corners" rule has long been the law in Indiana. *Id*. It requires that as to any matter expressly covered by a written instrument or trust agreement, the provisions of that instrument, if unambiguous, determine the terms of the trust; the intention of the settlor will be determined within the four corners of the instrument. *Id*. Unless the court can say from a consideration of the entire instrument that a given clause is ambiguous, extrinsic evidence is inadmissible even to explain the instrument's meaning. *Id*. A document is not ambiguous merely because parties disagree about a term's meaning. *Kelly v. Estate of Johnson*, 788 N.E.2d 933, 935 (Ind. Ct. App. 2003), *trans. denied*. Rather, language is ambiguous only if reasonable people could come to different conclusions as to its meaning. *Id*. Here, both parties agree that the language of the Trust instrument is not ambiguous and that Russell's intent can be determined from the four corners of the document itself. However, relying on the same language, both parties reach different results.

It might be beneficial here to include the disputed provision of the Trust again. The fourth amendment to the Trust instrument provided for the distribution of assets as follows:

> Paragraph E, of Article XIII, of said Amended Revocable Trust agreement, as heretofore amended, is hereby further amended to read as follows, to-wit:
>
> E. Upon the Grantor's death, all remaining principal and any undistributed income of this Trust shall be distributed as follows:
>
> 1. Grantor's Successor Trustee shall pay all expenses incidental to setting this Trust and shall make the following distributions, free of this Trust, to-wit:

. . .

b. All real property in Indiana, presently comprising one hundred fifty-six (156) acres, more or less, shall be distributed to said Harold Kinsler, and if he fails to survive the termination of this Trust, then distribution shall be to his issue, per stirpes, who do survive it.

2. All stocks, bonds and other investments shall be sold and liquidated, and then all remaining assets, principal and accumulated income, of this Trust shall be distributed, free of this Trust, as follows: . . .

(Appellant's App. pp. 54-56). The fifth amendment to the Trust added, as a new subparagraph:

3. All inheritance, estate and succession taxes, including interest and penalties thereon, by reason of Grantor's death, with respect to the assets distributed pursuant to this Paragraph E, to any beneficiary shall be charged to and paid by such beneficiary. Successor Trustee shall withhold such amounts or make a demand on each such beneficiary for payment of his or her proportionate share of such inheritance, estate and succession taxes due as a result of assets being distributed to such person.

(Appellant's App. p. 58).

Relying solely on the provisions of the Trust instrument, the Trustee examines the specific language within Paragraph E, of Article XIII of the Trust's fourth amendment and the order of the bequests. In particular, the Trustee focuses on the Article's format which first indicates the payment of "all expenses incidental to settling this Trust" and then, in an additional provision, bequeaths real estate to Kinsler. (Appellant's App. p. 54). Based on this set-up, the Trustee maintains that the payment of administrative expenses should precede the distribution of Kinsler's bequest. In other words, the Trustee asserts that Kinsler should take from the net estate.

On the other hand, Kinsler differentiates between specific bequests, like his devise of real estate, and the fractional bequests of "all stocks, bonds and other investments . . . and all remaining assets" to several beneficiaries. (Appellant's App. p. 55). Relying upon Indiana's case law, Kinsler argues that specific bequests are not chargeable with administrative costs, absent contrary provisions. Thus, Kinsler asserts that he takes from the gross estate prior to the deduction of expenses.

When a person dies his real and personal property are charged with the expenses of administering the estate, and with the payment of debts and expenses. *See* Ind. Code § 29-1-7-23. Despite this general rule, a person has considerable flexibility in creating a plan of distribution of his estate and may charge or exonerate certain portions of his property as to the burdens of debts, taxes, and expenses. *See American Fletcher Nat'l Bank & Trust Co. v. American Fletcher Nat'l Bank & Trust Co.*, 314 N.E.2d 810, 814 (Ind. Ct. App. 1974). One of the typical methods of assigning the payment of debts, taxes, and expenses, besides including an explicit provision in the Trust instrument, is by distinguishing between specific bequests and fractional bequests of the residue.

A specific bequest is a bequest of some definite or specific part of an estate which is capable of being determined, identified and distinguished from other like things that compose the estate. *In Re Brown's Estate*, 252 N.E.2d 142, 150 (Ind. Ct. App. 1969), *overruled on other grounds Pepka v. Branch*, 294 N.E.2d 141 (Ind. Ct. App. 1973). It may consist of money if it is designated with sufficient certainty. *Id*. The particular treatment of a specific bequest as it relates to the payment of administrative expenses was clarified in our supreme court's seminal decision of *Corya v. Corya*, 22 N.E. 3 (Ind. 1889). In *Corya*, Elizabeth

Woodfill died intestate, disposing of her entire estate via a specific bequest shared by her two granddaughters followed by a bequest of the entire residue to her daughter. *Id*. at 3. The issue before the court was which funds would be liable for the payment of the administration costs. *Id*. at 4. Our supreme court stated that

> It is also presumed that by singling out a specific article by way of a specific bequest the testator intends that the legatee shall take in preference to those legatees whose bequests are not specifically pointed out. . . . That as long as any of the assets, not specifically bequeathed remain, such as are specifically bequeathed are not to be applied in payment of debts; although to the complete disappointment of the general legacies.

Id. (internal citations omitted).

In the more recent opinion of *American Fletcher Nat'l Bank & Trust Co.*, 314 N.E.2d at 810 (Ind. Ct. App. 1974), we investigated the payment of administrative expenses with regard to fractional bequests. Referring to an earlier supreme court decision, we stated that where "a will leaves a designated beneficiary a stipulated percentage or proportion of the testator's estate or property, the view is generally taken that, absent contrary context, deduction of the debts, expenses of administration, and the like, should be made from the gross holdings in order to determine the base for computing the amount of the bequest." *Id*. at 817-18 (quoting *Stoner v. Custer*, 251 N.E.2d 668, 671 (Ind. 1969)). Accordingly, absent contrary language in the Trust instrument, a specific bequest is handed to the beneficiary free of payment of administrative costs, whereas a fractional bequest is based on the gross estate and can only be distributed after payment of costs.

Thus, the mere pronouncement of a general rule concerning the payment of administrative costs when the Trust instrument differentiates between specific bequests and

fractional bequests does not preclude a close examination of the provisions of the Trust. As we stated above, the primary purpose in construing a trust instrument is to ascertain and give effect to the settlor's intention. *Hauck*, 286 N.E.2d at 861. Here, we conclude that the trust provisions contain clear intrinsic evidence of Russell's intent that Kinsler should take his bequest unburdened by the payment of administrative costs.

In the Trust before us, Russell used a numerical order in the division of his estate and, presumably, this is the order in which the mandates were to be carried out. Pursuant to section 1 of Paragraph E of Article XIII, the Trustee is directed to "pay all expenses incidental to settling this Trust." (Appellant's App. p. 54). However, this general guideline does not include an indication that these payments are to be made from any specific fund or from the residue of the estate. The only direction the four corners of the Trust provide is that the incidental expenses shall be paid. If Russell had intended to have these obligations paid prior to the distribution of all his assets or paid from the residue, he could have easily accomplished this by including specific wording.

By contrast, Paragraph E of Article XIII does include an express treatment of the payment of inheritance taxes. The third part of the Paragraph, added by a fifth and final amendment to the Trust, allocated the payment of inheritance tax to all beneficiaries, without any exceptions. In fact, the Trustee is even instructed to make a demand on each beneficiary for payment of his or her proportionate share. It can be inferred that had Russell intended to allocate the administrative expenses in a similar fashion, he would have included that specific language when he clarified the payment of inheritance taxes with the fifth amendment to the Trust instrument.

The Trustee now argues that the progression of amendments indicates that Russell intended to treat all beneficiaries equally, that is "they are all given certain property, personal property, real estate and cash after administrative expenses are paid." (Appellant's Br. p. 7). The Trustee focuses on the first amendment, dated April 30, 2001, which commences Article XIII by distributing Russell's Florida home to a beneficiary prior to ordering the Trustee to pay all expenses incidental to settling the Trust and to distribute the remaining principal and income. The second amendment, executed on April 30, 2001, retains the same order, but changes the beneficiary of the Florida residence. Next, in the third amendment, signed on October 20, 2003, after elaborating that Russell is now residing in Indiana and the laws of Indiana apply to the Trust instrument, the amendment is silent as to the Florida residence and Paragraph E of Article XIII appears in its current form, whereby the Trustee "shall pay all expenses incidental to settling this Trust and shall make the following distributions, free of this Trust. . ." (Appellant's App. p. 51).

We disagree with the Trustee that this distribution change between the first and second amendment versus the third amendment clearly establishes that Russell intended Kinsler to take his bequest from the net estate, after the payment of administrative costs. Rather, the change merely indicates that due to Russell's move to Indiana, the Florida residence had been sold and was no longer part of the estate and thus unavailable for distribution.[1]

[1] Additionally in support of her argument, Trustee refers to this court's opinion in *Hanson v. Valma M. Hanson Revocable Trust*, 855 N.E.2d 655 (Ind. Ct. App. 2006). However, we find *Hanson* to be inapposite to the case at hand. The Hanson trust clearly provided that inheritance tax and administrative expenses had to be apportioned across all of the trust's assets. *Id*. at 663. Also, we are mindful to recall our admonition in the *Trust Agreement of Westervelt v. First Interstate Bank of Northern Indiana*, 551 N.E.2d 1180, 1182 (Ind. Ct.

In sum, while a grantor may provide for preferential treatment between beneficiaries, he must do so unambiguously within the four corners of the Trust instrument and without violating some positive rule of law or public policy. *See Hauck*, 286 N.E.2d at 861. Our review of Russell's Trust with regard to the payment of administrative expenses reflects that he did not intend to deviate from the applicable legal principles proponed in *Corya* and *American Fletcher Nat'l Bank & Trust Co*. in the bequeathing of his estate. Therefore, we conclude that Kinsler takes his specific bequest prior to the payment of administrative costs. Thus, we affirm the trial court.

CONCLUSION

Based on the foregoing, we conclude that the trial court correctly interpreted the provisions of the Trust by ordering that the beneficiary of the specific devise of real estate is

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App. 1990), *reh'g denied*, where we stated that "[b]ecause the construction of [trusts or wills] is dependent upon the particular language used and the surrounding circumstances [], courts must be careful to consider decisions within the context of the particular language and circumstances involved in each case. We note that it is for this reason that the outcomes and theories on which such outcomes are based are so variable."

not required to contribute to the payment of the administrative expenses incurred by the Trust.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.